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No. 07-20

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IN THE

Supreme Court of the United States

BARR LABORATORIES, INC.,
Petitioner,

v.

MEERA SAMANTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

JOSEPH P. THOMAS *
LINDA E. MAICHL
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
(513) 698-5000

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON D C 20002

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CORPORATE DISCLOSURE STATEMENT

Petitioner Barr Laboratories, Inc.'s corporate disclosure statement was set forth at page (i) of the Petition for a Writ of Certiorari and there are no amendments to that statement.

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INTRODUCTION

Barr's petition seeks guidance on what constitutes a good faith joinder of a resident defendant: particularly, what standard will be employed in making the determination, how is the burden of establishing that the joinder is not in good faith satisfied, and what evidence may be considered in making the determination. In response, Samanta attempts to simplify the issues as involving only the fact of service or non-service of the resident defendant at the time of removal and the fact of dismissal or non-dismissal of the unserved resident defendant at the time of judgment. Those facts, however, merely highlight the importance of this Court's review of the legal issues presented.

That the resident defendant was never served in this case suggests that Samanta lacked any good faith intent to pursue claims against the resident defendant. As set forth more fully below, plaintiff's intent in pursuing claims against a resident defendant is precisely the question that Petitioner argues must and should be answered under the fraudulent joinder doctrine. That is especially true where, as here, a plaintiff remains steadfastly silent in response not only to evidence presented regarding her abject failure to serve the resident defendant, but also when the district court cites the evidence of non-service and plaintiff's subsequent silence in ruling that the resident defendant had been fraudulently joined.

Rather than address those critical legal issues in response, however, Samanta again chooses to be silent. Instead, Respondent suggests that this case is inappropriate for the granting of certiorari either because it is factually or procedurally inapposite or because a defendant could engage in self-help in lieu of clear guidance from this Court (i.e. ask the state court to dismiss the non-served defendant against whom the plaintiff had no intent of proceeding), or because a lower court itself might act in a way that obviates the need for clarity from this Court regarding fraudulent joinder (i.e., a

state court might at some point *sua sponte* dismiss a non-served defendant against whom a plaintiff has no intent of proceeding).

In making those arguments, Samanta ignores the teachings of *Wilson* and *Caterpillar* and urges this Court instead to accept the status quo in which certain jurisdictions, including the Ninth Circuit, are free to ignore facts clearly establishing plaintiff's lack of a good faith intent to pursue claims against a resident defendant when deciding whether that defendant has been fraudulently joined.

Barr submits that such a result will serve only to further perpetuate the confusion and ambiguity surrounding the fraudulent joinder doctrine for both courts and litigants alike. For the reasons set forth in Barr's Petition, as well as those set forth below, Barr respectfully requests that this Court grant its Petition for Writ of Certiorari.

A. This Case Is Not Procedurally Unusual

Samanta asserts this case developed due her "misunderstanding" about whether the resident defendant had been served and the district court's purported "misunderstanding" about whether a state court summons had been issued for the resident defendant.

That argument might have had merit but for the simple fact that Samanta had not one, not two, but at least four opportunities to correct any "misunderstandings" and advise the district court of her "belief" that the resident defendant had been served. She did not. She remained silent when evidence to the contrary was brought to her attention in Barr's notice of removal, when the district court issued its show cause order, when Barr responded to that order, and when the district court vacated the show cause order. Not until months later did Samanta contend that the attorney who assisted in filing the suit told her that the resident defendant had been served—and still, she provided no evidence to support her contention and the resident defendant remained unserved.

Samanta's argument begs the question—at what point must the purported "misunderstandings" be seen as more—as Samanta's lack of a good faith intent to pursue claims against the resident defendant?

Similarly, even if it were true—which it is not[1]—that the district court retained jurisdiction based on its purported "misunderstanding" that a state court summons had not issued for the resident defendant, Samanta could have corrected that "misunderstanding." Again, she remained silent.

At bottom, Samanta's alleged "misunderstandings" go to the heart of the issues presented to this Court regarding the evidence a court should consider in determining whether a resident defendant is joined in good faith. May the plaintiff remain silent in the face of evidence showing the plaintiff does not have a good faith intent to pursue her claims? This Court's early precedent indicates the response is "No." Yet, the Ninth Circuit's order indicates the response is "Yes."

Must the plaintiff present evidence to contravene the evidence presented by the non-resident defendant? This Court's early precedent indicates the response is "Yes"—a plaintiff's failure to offer evidence contravening the evidence provided by the defendant constitutes acquiescence. Early precedent also instructs evidence outside the pleadings should be considered. The Ninth Circuit's order indicates the response is "No."

The importance of the issues is magnified when one considers that the information to show whether or not there is a

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[1] The district court's order stated Barr had provided information that Samanta had "never served" Harwer "nor requested a summons for service from the state court or this Court." (App. 10a.) Only one fact was incorrect. A summons had issued from the state court, but the resident defendant had not been served and Samanta never sought a summons from the district court. There is no indication the court retained jurisdiction based on the single "misunderstanding" as to whether a state court summons had been issued.

good faith intent to pursue a claim frequently is solely within the plaintiff's possession. As between Barr and Samanta, only Samanta knew her "understanding" regarding whether the resident defendant had been served.[2] When she failed to advise the district court of her "understanding" in the face of contrary evidence, she acquiesced to those facts. Yet, federal courts do not consistently require plaintiffs to come forward with evidence to refute facts advanced by the removing defendant. *See Hauck v. ConocoPhillips Co.*, 2006 WL 1596826 at *4, n.4 (S.D. Ill. 2006) (noting removing defendant's submission of evidence to support fraudulent joinder claim does not impose burden on plaintiff to submit evidence to disprove fraudulent joinder); *Phillips Petroleum Co. v. AIG Tech. Servs., Inc.*, 99 F. Supp. 2d 787, 791 (S.D. Tex. 2000) (noting plaintiff could submit evidence to rebut removing defendant's allegation of fraudulent joinder, but is not required to do so).

The facts of this case are neither unusual nor unlikely to occur again. Clarifying the burden of proof and what evidence may be considered would assist courts in applying the fraudulent joinder doctrine to determine if a plaintiff has a good faith intent to pursue claims against a resident defendant.

B. Existing Law Does Not Provide a Solution

Samanta postulates a "simple solution" exists—ask the state court to dismiss the resident defendant or wait until the state court *sua sponte* dismisses that defendant. Whether a state court will dismiss the resident defendant "at an early stage" is speculation. Furthermore, that solution raises two

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[2] Samanta had other information she never shared with the district court and which Barr did not learn until after the Ninth Circuit entered its order. The same day Samanta filed her complaint, she sent Harwer, the resident defendant, a letter demanding binding arbitration pursuant to the terms of a physician/patient agreement between Harwer and Samanta. Those agreements are valid under California law and provide that the parties are giving up their constitutional rights to have disputes decided by a court of law. Samanta then participated in the arbitration proceeding with Harwer, ultimately abandoning it.

other impediments to removal—the voluntary-involuntary rule and the one-year time limit in 28 U.S.C. § 1446, both of which provide opportunities for the plaintiff to name a resident defendant without a good faith intent to pursue the claims.

The "voluntary-involuntary rule" bars removal after a resident defendant is dismissed where the dismissal is not the voluntary act of the plaintiff. *See, e.g., Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 546 (5th Cir. 1967) (noting under voluntary-involuntary rule if resident defendant's dismissal results from defendant or court acting against plaintiff's wishes, case is not removable).[3] In addition, the one-year time limit in § 1446 precludes removal if the resident defendant is not dismissed within one year of the action's commencement. *But see Tedford v. Warner-Lambert*, 327 F.3d 423, 428-29 (5th Cir. 2003) (permitting tolling of one-year time limit where plaintiff's conduct in preventing removal inequitable).

As a result, if the diverse defendant requests dismissal or awaits dismissal of the defendant by the court, the voluntary-involuntary rule may preclude removal. If an exception exists to the rule, but the dismissal occurs more than a year after the action was commenced, the one-year limit may preclude removal (unless the action is in the Fifth Circuit and then only if the plaintiff's conduct is considered to be inequitable so the "equitable exception" applies). In either case, the plaintiff never had a good faith intent to pursue the claim against the resident defendant. Yet, the defendant has no mechanism to exercise its right to federal jurisdiction without the ability to invoke the fraudulent joinder doctrine.

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[3] Some circuits apply exceptions to the voluntary-involuntary rule, others do not. *See Insinga v. LaBella*, 845 F.2d 249, 254 (11th Cir. 1988) (permitting removal after resident defendant dismissed on sovereign immunity grounds); *Grandy v. Crompton*, 55 F. Supp. 2d 593, 596 (S.D. Miss. 1999) (noting Fifth Circuit has not followed Eleventh Circuit's approach in *Insinga*).

C. Barr Is Not Advocating a Rule that Is Impractical or that Would Violate State Sovereignty

Barr does not seek guidance that is either impractical or violative of state sovereignty. A state court is not "better placed" to determine a plaintiff's intent in pursuing a claim against a resident defendant. A state court will have no more information available than does a federal court if the plaintiff remains silent. If "perfectly acceptable reasons" exist as to why a defendant has not been served, the plaintiff merely needs to present them.

Furthermore, Samanta's argument that "[i]f what took place in the present case at the trial court level were found to be a proper method of establishing diversity jurisdiction based on removal, a rule of law would be created that any non-resident defendant, unhappy at the pace of proceedings in state court against a resident defendant, could file a notice of removal and, in essence, ask the district court to second-guess whether the state court had acted sufficiently quickly to dismiss unserved defendants" suffers from the same flaws discussed above.

In addition, the argument implies the case was removed based on the "pace of proceedings." However, the case was removed due to Samanta's failure to timely serve the resident defendant. Upon learning that fact, Barr had two choices: remove the case within the thirty days provided in the statute, or risk an untimely removal. If Samanta's failure to serve the resident defendant was not due to her lack of good faith intent to pursue claims against that defendant, she needed only to advise the district court. She did not.

D. The Ninth Circuit Ignored *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921) and *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996)

In *Wilson*, this Court held that if the plaintiff does not take issue with or object to the statements made in the removal

petition, the plaintiff "must be taken as assenting to its truth and the petitioning defendant need not produce any proof to sustain it." *Id.* at 97-98. Barr provided evidence to show the resident defendant had not been served within the time allowed under state service rules. Samanta remained silent. The Ninth Circuit ignored those facts. Doing so was in direct contradiction to this Court's decision in *Wilson.*

Moreover, Barr is not merely disputing that this case was wrongly decided. Rather, Barr submits that in vacating the district court's judgment, the Ninth Circuit's decision conflicts with this Court's prior decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996).

Samanta's arguments as to why the Ninth Circuit was correct in ignoring *Caterpillar* are misplaced. "Sham" defendants may not be "automatically eliminated from a suit after removal under the doctrine of fraudulent joinder," but an unserved defendant never becomes a party to an action and a court never obtains jurisdiction over that party. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 212 n.1 (2001) (Ginsburg, J., dissenting) (stating: "Though named as a defendant, Parker was never served with the complaint, and therefore did not become a party to this litigation.").

Samanta further argues that *Caterpillar* is distinguishable because she "never [took] [] an affirmative step—she has never resolved her differences with Harwer in the court system and there is nothing in the record indicating that she has done so elsewhere." It is precisely that absence of good faith intent around which this matter turns. Samanta's failure to serve Harwer was a voluntary action—because Samanta chose not to serve Harwer, Harwer never became a defendant. Therefore, as in *Caterpillar*, due to Samanta's voluntary action, complete diversity existed at the time of final judgment in favor of Barr. Moreover, there is "nothing in the record" because Samanta ignored not less than four separate

opportunities to submit evidence for the record that would manifest her intent.[4]

E. Samanta's Discussion of *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907); and *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), Misrepresents Those Cases and Spotlights Undeveloped and Ambiguous Facets of the Fraudulent Joinder Doctrine

Samanta discusses *Wilson*, *Wecker*, and *Pullman* to support an argument that this Court's prior holdings do not require a decision different from that reached by the Ninth Circuit. However, her discussion misrepresents those cases, and lends focus to the existing confusion and ambiguity regarding removal and fraudulent joinder.

Arguing Barr's reliance on *Wilson* is misplaced, Samanta contends the actions against Barr and Harwer were not separable. That argument ignores the point that under *Wilson* a plaintiff may not remain silent when evidence of fraudulent joinder is presented.

Samanta quotes *Mecom v. Fitzsimmons Drilling Co., Inc.*, 284 U.S. 183 (1931), for the principle that "in removal proceedings the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined." From that quote, Samanta argues the emphasis is not "what is going on in the mind of the plaintiff, but on the cause of action asserted against the resident defendant." Samanta's formulation omits part of the equation and confuses "motive" versus "intent." The plaintiff's motive for

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[4] Samanta further argues that she did not have a duty to litigate against Harwer once the action was removed. Yet the action was removed due to Samanta's failure to timely serve Harwer. At a minimum, Samanta had a duty to respond once the district court invited her to present evidence of good faith joinder in its order retaining jurisdiction. Her failure to do so should be considered when deciding whether joinder of the resident defendant was fraudulent.

filing in state court or including a resident defendant may not be relevant. But, as evidenced by this Court's decision in *Wecker*, the plaintiff's intent to pursue the claim against the resident defendant is relevant and determination of whether or not that intent exists is not limited to the pleadings.

Samanta admits that courts may pierce the pleadings to decide fraudulent joinder issues but asserts piercing is limited and the "focus is kept on the cause of action, not on the intent of the plaintiff." That assertion reflects a basic misunderstanding—one shared by courts and litigants alike—of what was considered in *Wecker* and this Court's holding. In *Wecker*, this Court stated:

> In view of this testimony and the apparent want of basis for the allegations of the petition as to [the resident defendant's] relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for the *purpose* of defeating the right of the corporation to remove the case to the Federal court.

Wecker, 204 U.S. at 185 (emphasis added). The definition of "purpose" is "intention." Evidence outside the pleadings was considered, as was the fact the plaintiff did not present evidence to contradict that presented by the defendant. The plaintiff's "subjective intent" also was considered.

> While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices *intended* to prevent a removal to a Federal Court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Id. at 185-86 (emphasis added). As established by this Court, then, the doctrine of fraudulent joinder does include the "subjective intent" of the plaintiff.

Finally, *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), does not address whether the fact of non-service precludes removal if the time for service under the state's civil rule has expired or whether a plaintiff's failure to timely serve a non-resident defendant is evidence of a plaintiff's lack of a good faith intent to pursue the claim against that defendant. The statement in *Pullman* that "a non-resident defendant should not be permitted to seize an opportunity to remove the cause before service upon the resident co-defendant is effected," is qualified by the statement that "[i]t is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove." *Id.* Those statements, together with *Wecker's* ruling that the plaintiff's subjective intent is relevant, leave open the question of whether the plaintiff's failure to timely serve evinces lack of a good faith intent to pursue the claims.

That question in turn leads back to the very issues Barr requests this Court to address: what standard will be employed in making the determination, how is the burden of establishing that the joinder of a resident defendant is not in good faith satisfied, and what evidence may be considered in making the determination.

CONCLUSION

Congress provided defendants the right to seek federal jurisdiction and this Court recognized over a century ago that "[f]ederal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals." *Alabama G.S.R. Co. v. Thompson*, 200 U.S. 206, 218 (1906). The guidance Barr seeks through its petition would assist the federal courts in construing the removal statute and the fraudulent joinder doctrine.

For the foregoing reasons and those stated in Barr's Petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

JOSEPH P. THOMAS *
LINDA E. MAICHL
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
(513) 698-5000

* Counsel of Record

Attorneys for Petitioner